Supreme Court, U.S.
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No. 99-379

IN THE

Supreme Court of the United States

BARRY T. SULLIVAN

Petitioner,

v.

NATIONAL RAILROAD PASSENGER CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

Respondent National Railroad Passenger Corporation, also known as Amtrak, has no corporate affiliates.

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STATEMENT OF THE CASE

This brief is respectfully submitted on behalf of the National Railroad Passenger Corporation ("respondent" or "Amtrak") in response to the petition of Barry T. Sullivan ("petitioner" or "Sullivan"), which seeks review of the Eleventh Circuit's Opinion and Judgment dated March 25, 1999 (the "Opinion and Judgment"). The Opinion and Judgment reversed the judgment for petitioner entered by the District Court based on petitioner's claim of unlawful retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000(e) *et. seq.*, the Civil Rights Act of 1991, 42 U.S.C. §1981(a), and the Florida Whistle Blower's Protection Act, Florida Stat. Ann. §448.102(3) (West 1998) (the "Retaliation Claim"), and remanded the case to the District Court for entry of judgment of dismissal on behalf of Amtrak. App. 1a-12a.

The Eleventh Circuit's Opinion and Judgment, contrary to petitioner's contention, does not reflect a conflict involving the Eleventh Circuit and other Circuit Courts of Appeal on an issue of law. *Compare* Pet. 8-17 *with* App. 6a-12a. Nor does it reflect the Eleventh Circuit's adoption of a so-called "pretext plus" burden of proof. *Id.* The Opinion and Judgment simply reflects the Eleventh Circuit's correct conclusion, based on a thorough review of the record, that viewing the evidence in a light most favorable to petitioner, there was insufficient probative evidence to support petitioner's Retaliation Claim. App. 6a-12a. There is no cause for this Court to review what amounts to a factbound argument concerning the evidentiary record below.

A. Facts Ignored by Petitioner.

To justify his petition to this Court, petitioner either ignores completely or lightly skips over indisputable evidence that demonstrates why the Eleventh Circuit's Opinion and Judgment was correctly decided.

In January 1994, well before petitioner first made the complaint which forms the sole basis for his Retaliation Claim, petitioner lost his management position as District Manager of Passenger Services in Miami, when the position was abolished as part of a nationwide reorganization by Amtrak. App. 3a. After the reorganization, petitioner exercised his union seniority and displaced a more junior employee in a non-management position of Yard Chief in Miami. *See* App. 3a; R5-110-79-82.[1]

The record evidence reveals that even before this January 1994 reorganization, petitioner had alienated many people in Amtrak management because of his questionable conduct. App. 11a., n. 4. Years earlier, when he was stationed in New York, Sullivan had engaged in an extra-marital affair with an Amtrak employee whom he was supervising at the time. R5-111-145-46,150; R5-112-218-20. Thereafter, in 1987, Sullivan voluntarily accepted a demotion in order to transfer to a management position in Miami, ostensibly to care for his ailing mother and to reconcile with his wife. App. 10a; R5-110-13-14, 30-32; R5-112-433-34; R5-113-147-48. After relocating, however, petitioner divorced his first wife and married the Amtrak employee he formerly supervised; this led Amtrak management officials to conclude that he had misled them concerning his professed reasons for relocating to Miami and to seriously question his integrity. App. 10a; R5-111-146; R5-112-191, 220-21, 249-51, 256-57, 280-84, 372-73, 433-34; R5-113-110-113, 147-48. Integrity concerns were further

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[1] "R" refers to the record on appeal in the Eleventh Circuit.

heightened because of a belief that while he served as District Manager in Miami, Sullivan had engaged in inappropriate nepotism on behalf of his former subordinate/now wife. App. 10a; R5-112-195-198, 212, 216-18, 296-97, 302-05; R5-113-113-14, 139-41.

By the time of the January 1994 reorganization, individuals in Amtrak management were openly questioning petitioner's honesty and integrity. *See* App. 10a-11a. Indeed, plaintiff was forced to admit at trial that he was well aware he had angered people in connection with his earlier move to Miami. App. 11a, n. 4.

In addition, in the first half of February 1994, shortly after the reorganization, Amtrak opened an investigation into petitioner's misuse of Publix's gift certificate and an Amtrak cellular phone. App. 3a. Petitioner could not account for eight missing certificates, which had been cashed at a grocery store near his home. *Id.* Moreover, petitioner admitted to making, along with his wife, over $1,000 worth of unauthorized calls on the company phone. *Id.* Despite this evidence, Amtrak ultimately took no formal action against petitioner regarding either the certificates or the phone. *Id.*

In mid-February 1994, after he had lost his management position through reorganization and after Amtrak had commenced an investigation concerning his misuse of company property, petitioner for the very first time lodged the complaint that underlies his Retaliation Claim. App. 3a. Acting through an attorney, who communicated with Amtrak attorneys in Washington, D.C., petitioner charged that in late December 1993, before the reorganization, petitioner had been the victim of a homosexual advance by his then immediate supervisor at the end of a day in which the two had been traveling together on business. App. 2a-3a; R5-112-331-31. Petitioner's attorney invited Amtrak to work out a settlement of this charge. R5-112-331-33, 347-49.

Petitioner's charge was completely uncorroborated: the two men were allegedly alone when the purported incident happened in a hotel parking garage. *See* App. 2a. Moreover, there was no evidence -- offered either to Amtrak in 1994 or subsequently at trial in 1997 -- that the supervisor had ever before been accused of, let alone found to have committed, a single act of sexual indiscretion with anyone, male or female. Amtrak investigated petitioner's uncorroborated charge of sexual harassment and concluded that it was baseless. App. 3a.

Four months after Sullivan made his charge, in June 1994, petitioner's work schedule as Yard Chief in Miami was changed from four days to five days so that Amtrak could comply with an FDA requirement concerning inspection and cleaning of inbound trains. App. 3a. The next month, in July 1994, all Yard Chief positions were eliminated by Amtrak nationwide due to budget constraints, after which petitioner again exercised his union's seniority and assumed a position as Chief On Board Service. App. 3a.

At the trial of this action,[2] petitioner, over Amtrak's objection, was allowed to submit evidence and argue to the jury that Amtrak's investigation concerning petitioner's misuse of company property, the changing of petitioner's work schedule as Yard Chief and Amtrak's subsequent elimination of his Yard Chief position all constituted unlawful retaliatory acts by Amtrak, actions purportedly motivated by the sexual harassment complaint he had lodged in mid-February 1994. App. 4a, 7a.

Yet, by the time this case was heard on appeal to the Eleventh Circuit, petitioner was forced to concede that Amtrak's investigation could not be considered retaliatory

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[2] The case was tried to a jury before U.S. Magistrate Judge Barry L. Garber of the United States District Court for the Southern District of Florida. App. 4a, 22a-23a.

because it pre-dated his sexual harassment complaint. App. 7a.[3] The Eleventh Circuit also found no evidentiary basis for petitioner's contention that Amtrak's actions when petitioner was Yard Chief were retaliatory, rather than legitimate, non-pre-textual business decisions. App. 7a-8a. Notably, in his petition to this Court, petitioner does not -- and cannot -- dispute the Eleventh Circuit's conclusions that *none* of the foregoing actions by Amtrak in 1994 were in any way retaliatory, even though he had succeeded in taking precisely that position in the District Court.

In his petition to this Court, petitioner is now left to complain about Amtrak's failure to select him for various management level positions for which he applied at least *one year* after his sexual harassment complaint was lodged. Pet. 3, 4-6. Although petitioner at one time or another has complained about Amtrak's failure to select him for at least five different management positions he applied for in 1995 (App. 3a-4a; Pet. 3-4), Sullivan now argues to this Court that the Eleventh Circuit committed an important legal error based simply on his purported evidence of retaliation relating to only three of those jobs. Pet. 4-6. As respects these three positions, petitioner does not profess to offer any direct evidence of a retaliatory motive by Amtrak. *See id.* He relies solely on what can only charitably be described as "indirect" (*i.e.*, circumstantial) evidence.

Sullivan claims that retaliation explains his failure to be selected for the position of Product Manager-Atlantic Services, for which he applied in March 1995. Pet. 4-5; App. 3a-4a, 9a. But the record reflects that the actual decision-maker was Allan

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[3] As the Eleventh Circuit's Opinion and Judgment notes, petitioner also initially tried to contend in the District Court that even his January 1994 demotion from the position of District Manager of Passenger Services in Miami was retaliatory, even though it too plainly pre-dated his sexual harassment charge. App. 7a.

Edelston, who testified that he first heard about petitioner's sexual harassment complaint a year *after* he decided to fill the position by selecting another Amtrak employee named Dennis Hale.[4] App. 9a; R5-113-38. Moreover, Mr. Edelston explained under oath at trial that he had chosen Mr. Hale because of his experience managing the company's Autotrain, Amtrak's flagship train. App. 9a; R5-113-33-35. Petitioner does not cite evidence indicating that Mr. Hale was unqualified for the position. On the contrary, Sullivan's petition can do no better than cite to Sullivan's own self-serving testimony at trial as to why he might have been better qualified than Mr. Hale for the Product Manager position. *See* Pet. 5; R5-110-120-23.

As for the Service Manager position in Miami (App. 4a), the record reflects that the actual decision-maker was Dennis Hale. App. 10a. Like Mr. Edelston, Mr. Hale testified at trial that he was not aware of petitioner's sexual harassment complaint until late 1996, long after he hired Scott Weddle for the Service Manager job. App. 10a; R5-113-55-56. Mr. Hale testified that he hired Mr. Weddle because of his training background in on-board service and his philosophy of integrating his employees into the decision-making process; Mr. Hale considered Weddle the best qualified applicant for the job. App. 10a; R5-113-50-55. Once again, Sullivan's petition offers no evidence that Mr. Weddle was unqualified for the

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[4] Sullivan now professes to find evidence that Allan Edelston knew about Sullivan's harassment charge before he chose Mr. Hale to fill the Product Manager position (Pet. 4-5 and n. 2). Petitioner refers to testimony by Mr. Scott, the man charged with harassing Sullivan, which purportedly indicates Scott told "Stan" Edelston about the charge. *See* R5-114-70-72. But there is no testimony specifying *when* Scott supposedly did so. Not surprisingly, petitioner did not even rely on this purported evidence of Mr. Edelston's prior knowledge in his Answer Brief to the Eleventh Circuit. *Compare* Pet. at 4-5 and n. 2, citing, R12-158-70-72 *with* Answer Brief to Eleventh Circuit 11 and 31-32, which does not argue that Edelston had prior knowledge.

Service Manager job.[5]

Finally, as respects the New Orleans Manager of Terminal Services position, for which Sullivan applied in May 1995 (App. 4a), petitioner stresses that Charles Bothwell -- unlike the other decision makers -- was previously aware of Sullivan's charge. Pet. 5. But petitioner fails to acknowledge that *before* Sullivan first lodged his complaint, Mr. Bothwell *also* was aware of the serious doubts entertained by management employees concerning petitioner's lack of integrity. App. 10a. The evidence reflects that Boswell attended management meetings in January 1994 in which people raised "significant" concerns about petitioner's integrity. App. 10a-11a; R5-112-247, 249-51, 256-58, 280-84, 296-97, 302-05, 372-73; R5-113-110-15, 147-48. Once again, moreover, petitioner offers no evidence that the man Bothwell selected for the New Orleans Terminal Services position, James Turngren, was unqualified. Instead, petitioner lamely mentions that Mr. Turngren's position before he became Manager of Terminal Services was "lower" than the position Sullivan had held *before* the January 1994 reorganization, as if that fact somehow made Sullivan more qualified than Turngren 16 months later in May 1995. *See* Pet. 5.

B. Petitioner's Speculation About the Basis for the Jury's Verdict.

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[5] Petitioner also purports to point to evidence that Amtrak's Director of Human Resources, John Stafford, made the recommendation to hire Mr. Weddle. Pet. 5-6; citing R-9-146-136. *Compare* R5-112-319-21(Stafford testifies he made a recommendation but *Hale* made the decision). Once again, however, the evidence petitioner now relies on was not the evidence he cited to the Eleventh Circuit. *Compare* Pet. 5-6, citing R9-146-136 *with* Answer Brief to the Eleventh Circuit 12-13, citing R11-157-63. The Eleventh Circuit decision directly addressed the evidence upon which Sullivan relied below concerning this position. App. 10a.

Although the jury returned a verdict for petitioner on his Retaliation Claim, the District Court allowed petitioner to rely on not only Amtrak's failure to hire him for one of the three aforementioned management positions in 1995, but also Amtrak's February 1994 investigation concerning his misuse of company property, Amtrak's June 1994 decision to change his work hours as Yard Chief, and Amtrak's July 1994 decision to eliminate all Yard Chief positions nationwide, as well as Amtrak's decision not to select him for at least two other management level positions for which petitioner applied in 1995. App. 3a-4a, 7a-8a. Yet the jury made no special verdict findings indicating which particular adverse employment action or actions by Amtrak actually formed the basis for the jury's finding in favor of petitioner on his Retaliation Claim. Pet. 24a-25a. Petitioner, therefore, can only speculate that the jury actually found for him based on Amtrak's failure to select him for one of the specific three management positions cited in his petition. *See* Pet. 4, 18.

REASONS FOR DENYING THE WRIT

Petitioner is seeking review of a clearly *factbound* claim, which is that the Eleventh Circuit failed to give sufficient weight to the inferences petitioner would draw from his "indirect evidence" of alleged retaliatory conduct by Amtrak more than one year after he lodged a sexual harassment complaint. *See* Pet. 18. His attempt to argue that his petition concerns an important *legal* issue is simply belied by the record.

There is absolutely nothing in the Eleventh Circuit's Opinion and Judgment that can remotely be viewed as a misstatement of the applicable legal standards governing his Retaliation Claim. Moreover, petitioner's contention that the Eleventh Circuit applied a "pretext plus" burden of proof and that, by doing so, the Eleventh Circuit acted in conflict with numerous other Circuits (*see* Pet. 6-18), amounts to nothing

more than a mischaracterization of the Eleventh Circuit's decision. The Eleventh Circuit decision, on its face, simply concludes, quite correctly, that petitioner's meager "indirect" evidence of retaliation was legally insufficient to raise a triable issue of fact concerning retaliation. App. 12a.

Similarly erroneous is petitioner's contention that the Eleventh Circuit's Opinion and Judgment indicates the Circuit is "at best, internally split" on whether a case must be submitted for determination by the fact-finder whenever a plaintiff presents a *prima facie* case of discrimination and also evidence from which a fact-finder could reasonably reject defendant's explanation for its actions as a mere pretext for discrimination. *See* Pet. 10 and n. 5. There is nothing in the Opinion and Judgment itself even hinting at such a split. *See* App. 1a-12a. Moreover, petitioner made precisely this same "internal split" argument when he petitioned the Eleventh Circuit for rehearing or rehearing *en banc*. Sullivan Petition for Rehearing *En Banc* 5-15. The Eleventh Circuit found this contention so lacking in merit that the petition for rehearing was denied and no judge in regular service on the Eleventh Circuit requested that the Court be polled on the requested rehearing *en banc*. Pet. at 27a.[6]

The Eleventh Circuit's Opinion and Judgment simply and accurately lays out the applicable law. The decision correctly states that to make a *prima facie* case for retaliation, a plaintiff must show (1) a statutorily protected expression; (2) an adverse employment action; and (3) a causal link between

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[6] *See*, in this regard, *Arrington v. Cobb Co.*, 139 F.3d 865 (11th Cir. 1998), where the Eleventh Circuit unequivocally reaffirmed that any confusion on the subject of "pretext plus" engendered by a decision two years earlier in *Isenbergh v. Knight-Ridder Newspaper Sales, Inc.*, 97 F.3d 436 (11th Cir. 1996), *cert. denied*, 521 U.S. 1119 (1997) was later put to rest by subsequent Eleventh Circuit rulings. *Arrington*, 139 F.3d at 875 and n. 21.

the protected expression and the adverse action. App. 6a. The Eleventh Circuit properly observes that if (and only if) the plaintiff makes out a *prima facie* case of retaliation, then the burden shifts to the defendant to rebut the presumption of retaliation by producing legitimate reasons for the adverse employment action. App. 6a-7a. Moreover, the decision correctly concludes that once the defendant offers legitimate reasons, any presumption of retaliation simply disappears and the plaintiff must show that the employer's proffered reasons for taking the adverse action were actually a pretext for prohibited retaliatory action conduct. App. 7a.

The Eleventh Circuit's recitation of these applicable legal principles is entirely consistent with this Court's directives in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). Nor can there be any dispute about the Eleventh Circuit's conclusion that, in this particular case, the key inquiry was whether petitioner's evidence sufficiently supported the third prong of his evidentiary burden -- the existence of a causal link between his protected expression and adverse action. Pet. 6a-7a.

It is only the petitioner, not the Eleventh Circuit, who contends that the Eleventh Circuit applied a "pretext plus" burden of proof to petitioner's Retaliation Claim with respect to this causation element. It is only the petitioner, not the Eleventh Circuit, who insists that the Court of Appeals obligated petitioner to present evidence above and beyond that which would suffice to satisfy both his *prima facie* retaliation case *and* his burden of adducing evidence from which the jury could reasonably find that the employer's explanations for its actions were merely pretextual and that a real motive was discrimination. On the contrary, the Eleventh Circuit Opinion and Judgment merely concludes that petitioner's purely circumstantial evidence was "far too speculative" to support the jury's conclusion that Amtrak retaliated against Sullivan. Pet.

at 12a.

In his petition, Sullivan never once squarely addresses the fact that the alleged adverse employment actions upon which he now relies took place more than one year after his sexual harassment complaint. Lower courts have repeatedly held, quite logically, that such a prolonged interval between a plaintiff's "protected" activity and the employer's adverse action cannot support any reasonable inference of causal connection. *See, e.g., Payne v. Milwaukee Co.*, 146 F.3d 430, 434 (7th Cir. 1998) (action 13 months after protected expression by plaintiff is too remote in time to make a *prima facie* case on the element of causal nexus); *Grizzle v. Travelers Health Network, Inc.*, 14 F.3d 261, 268 (5th Cir. 1994) (10 months insufficient to support inference of retaliation); *Rath v. Selection Research, Inc.*, 978 F.2d 1087, 1090 (8th Cir. 1992) (six months too long to meet causal connection requirement); *Valdez v. Mercy Hospital*, 961 F.2d 1401, 1403 (8th Cir. 1992) (no retaliation where six months passed between the protected activity and the termination); *Jackson v. Pepsi-Cola, Dr. Pepper Bottling Co.*, 783 F.2d 50, 54 (6th Cir.), *cert. denied*, 478 U.S. 1006 (1986) (one year militates against finding of retaliation). *Compare Adusumilli v. City of Chicago*, 164 F.3d 353, 363 (7th Cir. 1998), *quoting Juarez v. Ameritech Mobile Communications*, 957 F.2d 317, 321 (7th Cir. 1992) (even suspicious timing, standing alone, does not create an issue of fact as to causal connection when plaintiff cannot prove termination was because of plaintiff's sexual harassment complaint rather than poor job performance).

Similarly, petitioner's evidence is woefully deficient on the issue of whether Amtrak offered pretextual justifications for its hiring selections in 1995. "Pretext" has been described by one lower court to mean "more than a mistake on the part of the employer; pretext means a lie, specifically a phony reason for some action." *Wolf v. Buss (America), Inc.*, 77 F.3d 914, 919 (7th Cir. 1996) (citation and internal quotes omitted). There

must be "such weaknesses, implausibilities, inconsistencies, incoherence, or contradictions in the employer's proffered legitimate reasons ... that a reasonable fact finder could rationally find them unworthy of credence." *Sheridan v. E.I. duPont de Nemours & Co.*, 100 F.3d 1061, 1072 (3d Cir. 1996 (en banc)), *cert. denied*, 521 U.S. 1129 (1997).

It is clearly not enough for a plaintiff like petitioner merely to insist that reasons given by an employer for its action are pretextual. That is because Title VII does not authorize a federal court to become a "super-personnel department that reexamines an entity's business decisions." *Barbour v. Browner*, 181 F.3d 1342, 1346 (D.C. Cir. 1999), *quoting Dale v. Chicago Tribune Co.*, 797 F.2d 458, 464 (7th Cir. 1986), *cert. denied*, 479 U.S. 1066 (1987). A plaintiff thus "must do more than cast doubt on the rationale proffered by the employer; the evidence must be of such strength and quality as to permit a reasonable finding that the action was obviously or manifestly unsupported." *Shorette v. Rite Aid of Maine, Inc.*, 155 F.3d 8, 13 (1st Cir. 1998), *quoting Ruiz v. Posadas de San Juan Assocs.*, 124 F.3d 243, 248 (1st Cir. 1997). Plaintiff's evidence must be sufficiently probative to raise a genuine issue of fact as to whether the employer's proffered reasons were not its true reasons for the challenged employment action. *See, e.g., Scott v. University of Mississippi*, 148 F.3d 493, 512 (5th Cir. 1998); *Sheridan v. E.I. duPont deNemours & Co.*, 100 F.3d at 1067. When a plaintiff offers circumstantial -- rather than direct -- evidence on the issue of pretext, the evidence should be "specific" and "substantial" in order to create a triable issue as to whether the employer intended to discriminate. *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1222 (9th Cir. 1998).

In this case, the meager circumstantial evidence offered by petitioner in an effort to meet his burden was plainly inadequate. Only an advocate, not a reasonable factfinder, could find that Amtrak's reasons for not selecting Sullivan for three management positions more than one year after he lodged

his sexual harassment complaint amounted to a mere "pretext" for retaliation. As the Eleventh Circuit concluded, petitioner's evidence was "far too speculative" to support his Retaliation Claim. Pet. 12a.

Finally, petitioner engages in sheer conjecture when he argues that the Eleventh Circuit's Opinion and Judgment "disregards the fact that the jury rejected Amtrak's proffered reasons for not promoting Sullivan in favor of Sullivan's evidence against that reason, either because the jury found that the real reason was retaliation or because Sullivan's evidence caused them to disbelieve Amtrak's given reason." Pet. 18. The jury may have found for petitioner on his Retaliation Claim below. But it made no special findings that would enable petitioner -- or anyone else -- to conclude that the jury rejected Amtrak's reasons for not selecting Sullivan for the three particular positions on which he now relies in his petition. *See* App. 24a-25a. Moreover, it is indisputable that the jury was wrongly subjected to petitioner's evidence and arguments that Amtrak had engaged in a host of other purportedly retaliatory acts -- concerning Amtrak's 1994 misuse of company property investigation and its 1994 Yard Chief decisions, to say nothing of two other 1995 hiring decisions that petitioner does not even challenge in his petition. It is now beyond dispute that these other actions by Amtrak were not, as a matter of law, a proper basis for Sullivan's Retaliation Claim. App. 3a-4a, 7a-9a, 11a-12a, 24a-25a.

The Supreme Court of the United States does "not grant a certiorari to review evidence and discuss specific facts." *U.S. v. Johnston*, 268 U.S. 220, 227, (1925) (Holmes, J.). The "Court's review ... is discretionary and depends on numerous factors other than the perceived correctness of the judgment [the Court] is asked to review.'" *Superintendent, Mass. Correctional Inst. v. Hill*, 472 U.S. 445, 460, 105 S.Ct. 2768, 2776 (1985) (Stevens, J., concurring in part and dissenting in part), *quoting Ross v. Moffitt*, 417 U.S. 600, 616-617 (1974). *See also*

General Talking Pictures v. Western Electric Co., 304 U.S. 175, 178 (1938) ("Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it").

Petitioner professes to find important legal issues and a conflict among the Circuits buried in an Eleventh Circuit Opinion and Judgment that thoroughly reviews the record evidence and concludes -- quite correctly -- that petitioner failed to adduce sufficient probative evidence to support his claim. The petitioner's argument "cannot obscure the truth that all that is involved [in this case] is an appraisal of the fair inferences to be drawn from the evidence." *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 455-456 (1959) (Frankfurter, J., dissenting).

In sum, the decision of the Court of Appeals need not and should not be the subject of further judicial review by this Court.

CONCLUSION

For all of the foregoing reasons, the writ of certiorari should be denied.

Dated: September 30, 1999

Respectfully submitted,

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